Zimmerman Plumbing and Heating Co., Inc. *and* Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Case 7–CA–41389

August 25, 2003

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On January 29, 2002, Administrative Law Judge Bruce D. Rosenstein issued the attached supplemental decision and order, supplemented by an erratum dated January 31, 2002.[1] The Respondent, the General Counsel, and the Charging Party each have filed exceptions to the supplemental decision, an accompanying supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions.[3]

I. INTRODUCTION

This case arises from the Respondent's alleged unlawful failure to recall two former unfair labor practice strikers, Tim O'Brien and James Fogoros. There is no contention that the Respondent unlawfully failed to recall O'Brien or Fogoros to their prestrike or substantially equivalent positions at the time the strike ended in September 1995. Instead, our focus is on whether the Respondent subsequently violated the Act by (1) failing to recall O'Brien to substantially equivalent positions that became available in 1998 and (2) refusing to consider O'Brien and Fogoros for other nonequivalent positions in 1998 because of their union activity.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Relevant Facts

On August 22, 1995, certain of the Respondent's employees commenced an unfair labor practice strike against the Respondent. Among the strikers were O'Brien, an apprentice sheet metal worker, and Fogoros, a journeyman sheet metal worker. The strike ended on September 6, 1995, when the Union, on behalf of the strikers, made an unconditional offer to return to work. The Respondent informed O'Brien and Fogoros that it had no available work for them, but that it would place them on a preferential hiring list and recall them when work was available in their respective job classifications.

Some time after the end of the strike, but before the end of calendar year 1995, O'Brien contacted the Respondent "about the availability of work, and when [he] could start working for [the Respondent] again." Fogoros too contacted the Respondent shortly after the conclusion of the strike and asked about employment. The Respondent, however, still did not have any work available for either O'Brien or Fogoros. Fogoros never again contacted the Respondent about available positions. O'Brien made several additional inquiries of the Respondent, but these efforts proved unsuccessful. In January 1997, O'Brien again contacted the Respondent about available work, at which time the Respondent assured O'Brien that it would contact him when things picked up.

In the meantime, O'Brien and Fogoros each accepted interim employment. In February 1997, O'Brien, having completed his apprenticeship, began working as a journeyman sheet metal worker for W. Soule, Inc. In June 1997, Fogoros began working as a journeyman sheet metal worker for Diversified Mechanical, Inc.

By the close of the supplemental hearing on October 29, 2001, the Respondent had not recalled either O'Brien or Fogoros. The Respondent maintains that it has had no openings for apprentice or journeymen sheet metal workers since September 1995. The record shows, however, that the Respondent hired new employees after September 1995.

On January 20, 1998, the Respondent hired Ed Weese as a "material expediter," performing primarily truck-driving duties. On February 16, 1998, the Respondent hired Bill MacPherson as a "material expediter," performing sheet metal work and related tasks in the Respondent's shop. In April 1998, the Respondent hired Matthew Bielski as a co-op student. The Respondent also hired Austin Wielenga to work during the summer of 1998 as a general laborer. On November 30, 1998, the Respondent hired Benjamin Emery as a truckdriver and

[1] The Board's original Decision and Order in this case issued on July 18, 2001. 334 NLRB 586.

[2] The Respondent and the General Counsel effectively have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall substitute a new Order, as well as a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

general laborer. Last, the Respondent hired Tammy Ickes on December 2, 1998, as a "Vicon machine operator." The Respondent hired these employees, notwithstanding that, since January 1998, it had posted at its facility a sign that said it was not accepting applications.

B. Procedural History

On June 2, 1998, the judge issued a decision finding that the Respondent violated Section 8(a)(3) and (1) by failing to recall O'Brien and Fogoros in 1998 to certain positions which he found were substantially equivalent to their prestrike jobs. The Respondent argued, as an affirmative defense, that it had no duty to recall O'Brien and Fogoros in 1998 because they previously had abandoned their employment relationship with the Respondent by obtaining "regular and substantially equivalent employment" elsewhere within the meaning of Section 2(3) of the Act.[4] The judge rejected the Respondent's abandonment defense because he believed the defense was not available to defeat the reinstatement rights of unfair labor practice strikers, as opposed to economic strikers. In addition, the judge found, under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Section 8(a)(3) and (1) by refusing to consider O'Brien and Fogoros, because of their union activity, for nonequivalent positions that became available in 1998.

On July 18, 2001, the Board issued its original Decision and Order, affirming in part and remanding in part for additional findings. *Zimmerman Plumbing & Heating Co.*, 334 NLRB 586 (2001).

With respect to O'Brien, the Board affirmed the judge's finding that the material expediter and Vicon operator positions that became available in February and December 1998, respectively, were substantially equivalent to O'Brien's prestrike job as an apprentice sheet metal worker. The Board, however, reversed the judge's ruling that the abandonment defense was not available in the case of unfair labor practice strikers. The Board therefore remanded the Respondent's contention, not passed on by the judge, that O'Brien had previously abandoned his employment relationship with the Respondent by accepting substantially equivalent employment at W. Soule.

With respect to Fogoros, the Board found that none of the positions that became available in 1998 were substantially equivalent to his prestrike job. Accordingly, the Board dismissed the allegation that the Respondent unlawfully failed to recall Fogoros to substantially equivalent positions. As described below, however, the Respondent's underlying contention that Fogoros too had abandoned his employment relationship with the Respondent remained an issue and was included in the remand.

Turning to the judge's finding that the Respondent unlawfully failed to consider O'Brien and Fogoros for certain nonequivalent positions that became available in 1998, the Board found that the Respondent's abandonment defense was relevant to the *Wright Line* analysis. Thus, the Board remanded the *Wright Line* issues to the judge to consider whether O'Brien and/or Fogoros previously had abandoned any interest in returning to work for the Respondent and, if so, whether the Respondent was aware of this when it did not consider them for nonequivalent positions that became available in 1998.

On remand, the judge found that the Respondent failed to establish that O'Brien had abandoned any interest in returning to work for the Respondent. The judge therefore reaffirmed his finding that the Respondent violated Section 8(a)(3) and (1) by failing to offer O'Brien the substantially equivalent material expediter and Vicon machine operator positions that became available in February and December 1998, respectively. The judge also reaffirmed his finding that the Respondent unlawfully failed to consider O'Brien for other positions, including the material expediter position that became available in January 1998, because of his union activity.

In contrast, the judge dismissed the remaining 8(a)(3) allegation that the Respondent failed to consider Fogoros for the jobs that became available in 1998 because of his union activity. The judge found that Fogoros previously had abandoned any interest in resuming employment with the Respondent and that the Respondent was aware of this at the time the positions became available. Alternatively, the judge found that, even if Fogoros had not abandoned any interest in working for the Respondent, the Respondent's failure to consider Fogoros for available positions in 1998 was not based on his union activity. The judge specifically credited the testimony of President Bruce Link and Operations Manager Richard Mahoney that Fogoros was not considered for the positions because he was a skilled journeyman and they did not believe he would be interested in these less-skilled jobs, which offered substantially lower wage rates than Fogoros was then earning at Diversified Mechanical.

[4] Sec. 2(3) of the Act provides, in pertinent part:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

III. ANALYSIS

A. Applicable Principles

As the Board explained in its 2001 decision in this case, both economic and unfair labor practice strikers retain their status as "employees" under Section 2(3). See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Therefore, an employer violates Section 8(a)(3) and (1) by failing to timely reinstate strikers to their prestrike or substantially equivalent jobs upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Marchese Metal Industries*, 313 NLRB 1022, 1032 (1994); *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).[5]

An employer may be relieved of its obligation to reinstate a former striker if it demonstrates, as an affirmative defense, that the striker abandoned his or her reinstatement rights. A striker, or a former striker awaiting reinstatement, may accept interim employment elsewhere. The Board has recognized that the right to seek interim employment is a vital adjunct to the exercise of the right to strike and is itself protected activity. See *Christie Electric Corp.*, 284 NLRB 740, 759 (1987). Accepting interim employment normally will have no effect on a striker's reinstatement rights. If, however, the employer establishes that a striker accepted other "regular and substantially equivalent employment," within the meaning of Section 2(3), then the employer may avoid its obligation to offer the striker reinstatement. See *Marchese Metal Industries*, 313 NLRB at 1028–1031; *Little Rock Airmotive, Inc.*, 182 NLRB 666, 666–667 (1970), enfd. in pertinent part 455 F.2d 163 (8th Cir. 1972). This burden is a heavy one.

The Board has long held that the question of whether a striker's interim employment constitutes "regular and substantially equivalent employment" cannot be answered by a "mechanistic application of the literal language of the statute." *Little Rock Airmotive*, 182 NLRB at 666–667; cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189–197 (1941) (approving Board's conclusion that discriminatees whom employer refused to hire because of their union affiliation did not forfeit their "employee" status or eligibility for reinstatement merely by accepting equivalent employment elsewhere). While the Board compares the terms and conditions of the striker's interim job to his prestrike job, the Board ultimately gives controlling weight to whether the "striker intended to abandon his employment with the employer by accepting interim employment with another employer." *Marchese Metal*, 313 NLRB at 1030; see also *Rose Printing Co.*, 304 NLRB 1076, 1076 fn. 3 (1991). Accord: *Alaska Pulp Corp.*, 326 NLRB 522, 524 (1998), enfd. in part sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). The Board presumes that the striker did not intend to forfeit his reinstatement rights; the burden is on the employer to affirmatively prove otherwise. See *Marchese Metal*, 313 NLRB at 1022 fn. 1, 1031.

B. Findings

Applying these principles, we find, in agreement with the judge, that: (1) the Respondent violated Section 8(a)(3) and (1) by failing to recall O'Brien to the substantially equivalent material expediter and Vicon operator positions that became available in February and December 1998; (2) the Respondent further violated 8(a)(3) and (1) by failing to consider O'Brien for other nonequivalent positions in 1998; and (3) the Respondent did not violate the Act by failing to consider Fogoros for nonequivalent positions.

1. The Respondent unlawfully failed to recall O'Brien to the substantially equivalent material expediter and Vicon operator positions that became available in February and December 1998. We agree with the judge that the Respondent failed to establish that O'Brien intended to abandon his reinstatement rights by accepting interim employment at W. Soule. Although the Respondent showed that O'Brien's interim job offered higher pay and better benefits, it produced no other evidence that O'Brien intended to permanently sever his employment relationship with the Respondent. The record does show, however, that O'Brien contacted the Respondent several times after his layoff about returning to work.[6] In these circumstances, we find that the Respondent failed to rebut the presumption that O'Brien did not intend to forfeit his recall rights. See *Marchese Metal Industries*, 313 NLRB at 1031; *K. Van Bourgondien & Sons*, 294 NLRB 268, 275 (1989).

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to offer O'Brien the substantially equivalent material expe-

[5] The absence of unlawful intent is not a defense. See *Fleetwood Trailer*, 389 U.S. at 378.

[6] The General Counsel argues, and we agree, that O'Brien was not required to maintain contact with the Respondent to preserve his reinstatement rights. See *Alaska Pulp Corp.*, 300 NLRB 232, 241 (1990), enfd. mem. 944 F.2d 909 (9th Cir. 1992). That O'Brien did so, however, further undermines the Respondent's claim of abandonment.

diter and Vicon machine operator positions that became available in February and December 1998, respectively.[7]

2. The Respondent also unlawfully failed to consider O'Brien for nonequivalent positions that became available in 1998, including a material expediter position that became available in January. It is undisputed that the Respondent did not consider O'Brien for these positions, even though he was qualified for the positions. Moreover, substantial evidence in the record shows that the Respondent knew or reasonably should have known that O'Brien was interested in any available positions. After the Union made an unconditional offer to return to work at the end of the strike, O'Brien inquired of Mahoney and Link about "the availability of work" and when he "could start working for them again." Following a similar inquiry from O'Brien in January 1997, Link assured O'Brien that he would be contacted if things picked up.

But the Respondent did not contact O'Brien when things picked up, and, in agreement with the judge, we find that the reason was O'Brien's union activity. It is undisputed that O'Brien engaged in significant union activity during the unfair labor practice strike, and that the Respondent had knowledge of this activity. Moreover, as the judge emphasized, the Respondent was hostile to O'Brien's union activity and previously had demonstrated a willingness to act on its hostility. See *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 fn. 1, 120 (1997) (*Zimmerman I*) (finding that the Respondent violated the Act by more harshly applying its absence rules to O'Brien and other union supporters, transferring O'Brien from a foreman position to isolate him from other employees, and terminating O'Brien from an apprenticeship program). In these circumstances, we find that the General Counsel established that the Respondent continued to engage in discrimination by failing to consider O'Brien for positions that opened in 1998 because of his union activity.

We therefore agree with the judge that the Respondent failed to establish that it did not consider, or in any event would not have considered, O'Brien for the positions that became available in 1998 because he previously abandoned any interest in working for the Respondent and because the Respondent did not think he was interested in less-skilled, lower-wage positions. The Respondent's contentions lack merit because we have affirmed the judge's conclusion that O'Brien did not abandon his employment relationship with the Respondent, and the judge specifically discredited the Respondent's contention that it believed O'Brien was not interested in returning to work. Indeed, the credited evidence shows not only that O'Brien inquired about "the availability of work" and when he "could start working for them again," but also that as late as January 1997, the Respondent itself assured O'Brien that it would contact him when work was available.

Our dissenting colleague argues that these facts cannot support a finding that O'Brien effectively applied for nonequivalent positions. We disagree.

All agree that O'Brien was not required to apply for his former or substantially equivalent positions following his unconditional offer to return to work. Indeed, upon receiving a striker's unconditional offer to return to work, it is the employer's affirmative obligation to recall the striker to his former or substantially equivalent position. See generally *Laidlaw Corp.*, supra at 1368. We are thus left to determine the significance of O'Brien's repeated inquiries of the Respondent about any available work and when he could start working for the Respondent again. Our colleague concludes that O'Brien's contacts merely evidenced his anxiousness to return to his former position or a substantially equivalent one. In contrast, we find that O'Brien's words reasonably put the Respondent on notice to consider him for *any* available position.

O'Brien did not simply ask about his former job. Rather, O'Brien asked generally about the "availability of work," and "when [he] could start working for them again." In January 1997, he asked if the Respondent "had *any* work available" (emphasis added). In our view, the open-ended nature of O'Brien's inquiries constituted oral applications for any available position. O'Brien's use of the word "any" plainly indicated an interest in whatever kind of work might have existed for him.

For all of these reasons, we find that O'Brien effectively applied for nonequivalent positions that became available in 1998.

Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by refusing to consider O'Brien for positions that became available in 1998, because of his union support.

3. Last, for the following reason, we affirm the judge's finding that the Respondent did not violate Section 8(a)(3) and (1) by failing to consider Fogoros for nonequivalent positions that became available in 1998. The judge specifically credited the testimony of President Bruce Link and Operations Manager Richard Mahoney that they did not consider, and would not have considered, Fogoros for the positions that became available in 1998 because they did not believe Fogoros, as a

[7] The judge ordered the Respondent to make O'Brien whole for any loss of earnings and other benefits suffered from the date of his offer to return to work in September 1995. As the Respondent and the General Counsel point out, the appropriate remedial period should run only from the date of the Respondent's unlawful failure to recall O'Brien.

skilled journeyman, would be interested in these less-skilled, lower-wage positions. As there is no basis for reversing the judge's credibility determinations, we affirm the judge's dismissal of this allegation.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Zimmerman Plumbing and Heating Co., Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to immediately reinstate unfair labor practice striker Tim O'Brien to the substantially equivalent material expediter and Vicon machine operator positions that became available in February and December 1998, respectively.

(b) Failing and refusing to consider Tim O'Brien for the nonequivalent positions that became available in 1998 because of his union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer unfair labor practice striker Tim O'Brien immediate and full reinstatement to the material expediter position that became available in February 1998 and to the Vicon operator position that became available in December 1998 or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate him to those positions, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider Tim O'Brien, and within 3 days thereafter notify O'Brien in writing that this has been done and that the unlawful action will not be used against him in any way.

(c) Notify Tim O'Brien, the Charging Party, and the Regional Director for Region 7 of current and future openings in the nonequivalent positions and substantially equivalent positions.

(d) Consider Tim O'Brien for current and future openings in the nonequivalent positions and substantially equivalent positions, in accord with nondiscriminatory criteria.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Kalamazoo, Michigan, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 1998.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, concurring in part and dissenting in part.

As explained in the first section below, I agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) of the Act by failing *to recall* former unfair labor practice striker Timothy O'Brien to positions which were *substantially equivalent* to his prestrike posi-

[8] As a result, we find it unnecessary to pass on the judge's findings that Fogoros previously had abandoned any interest in returning to work for the Respondent and that the Respondent was aware of this at the time.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion.[1] However, for the reasons set out in the second section below, I disagree with my colleagues' finding that the Respondent also violated Section 8(a)(3) and (1) by refusing *to consider* O'Brien for positions that became open during the backpay period which were *not substantially equivalent* to his prestrike position.

A. The Failure to Recall O'Brien to Substantially Equivalent Positions

In *Rose Printing Co.*, 304 NLRB 1076, 1076 (1991), the Board held that an employer was obligated to reinstate former economic strikers only to their prior positions or to substantially equivalent jobs, but not to any other jobs which were not substantially equivalent to the former strikers' prestrike positions. In reaching this conclusion, the Board explained that

> [o]ur duty is to ensure that strikers who have unconditionally offered to return to work are to be treated the same as they would have been had they not withheld their service. They are therefore entitled to return to those jobs or substantial equivalents if such positions become vacant,[2] and they are entitled to nondiscriminatory treatment in their applications for other jobs. Id. at 1078.

In the present case, I agree with the majority that the material expediter position which became available in February 1998, and the Vicon operator position which became available in December 1998 were substantially equivalent to O'Brien's prestrike position. Thus, O'Brien was entitled to return to these substantially equivalent positions when they became available and the Respondent violated the Act by failing to recall O'Brien to these positions.

In reaching this conclusion, I also agree that the Respondent's defense to this violation, i.e., that O'Brien abandoned his reinstatement rights and therefore was not entitled to reinstatement, must fail. As the majority points out, the evidence of O'Brien's repeated contacts with the Respondent about when he could return to work belies such a finding. As to these contacts, O'Brien inquired within a month or two of the end of the strike in September 1995 "about the availability of work, and when [he] could start working for [the Respondent] again." (Hearing of October 29, 2001, Tr. 265.) After that conversation, O'Brien had several other "conversations with [the Respondent] regarding the—being recalled to work." (Id.) In January 1997, when O'Brien again inquired "if [the Respondent] had any work available," he was told "[n]o, not at that time. When things picked up, [the Respondent] would give [O'Brien] a call." (Hearing of February 10, 1999, Tr. 83–84.) O'Brien's many inquiries about getting back to work again, about being recalled, establish that he did not abandon his right to reinstatement to his former position or to a substantially equivalent position.

B. The Alleged Refusal to Consider O'Brien for Nonequivalent Positions

I part company with the majority, however, when it concludes that the Respondent violated the Act by refusing to consider O'Brien for nonequivalent positions. To find the violation, the majority relies on the rather novel theory that O'Brien's repeated contacts with the Respondent were not only inquiries about his old job or substantially equivalent positions, but were also, in effect, sub silentio applications for nonequivalent jobs. In my view, the evidence does not support such a finding. Consequently, I would reverse the judge's finding that the Respondent unlawfully refused to consider O'Brien for these positions and dismiss this allegation of the complaint.

As explained above, former strikers are "entitled to nondiscriminatory treatment in their *applications* for other jobs [i.e., jobs not substantially equivalent to their prestrike positions]." *Rose Printing Co.*, 304 NLRB at 1078 (emphasis added). Since an employer has no obligation to recall former strikers to nonequivalent positions, logic and the above language dictate that a *sine qua non* for a finding that an employer unlawfully refused to consider an individual for a nonequivalent job is that the individual actually has applied for the position, that is, that he be an *applicant.* As the Board explained in *FES*, 331 NLRB 9, 15 (2000) (emphasis added):

> To establish a discriminatory refusal to consider, pursuant to *Wright Line*, [251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)], the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded *applicants* from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the *applicants* for employment. Once this is estab-

[1] I also agree with my colleagues, for the reasons stated by them, that the Respondent did not violate the Act by refusing to consider former striker James Fogoros for nonequivalent positions. For the reasons set out in the second section below, I would also dismiss this allegation on the additional ground that Fogoros never applied for such positions.

[2] In *Rose Printing Co.*, supra, the Board considered the reinstatement rights of economic strikers. The present case concerns unfair labor practice strikers who are entitled to immediate reinstatement at the conclusion of a strike. However, when, as here, an employer establishes that no positions were available when the strike ended, its obligation is the same as that of an employer after an economic strike, i.e., it must offer the former strikers reinstatement to their prestrike positions or to substantially equivalent positions when such positions become available.

lished, the burden will shift to the respondent to show that it would not have considered the *applicants* even in the absence of their union activity or affiliation.

In the present case, not only is there no evidence that O'Brien ever applied with the Respondent for nonequivalent positions, but there is no evidence that he ever intended to apply for such positions.[3] The majority attempts to finesse this fatal flaw in its analysis by simply asserting that "substantial evidence in the record shows that the Respondent knew or reasonably should have known that O'Brien was interested in *any* available positions." (Emphasis added.) That evidence, however, is neither substantial nor does it support such a finding. For, the "substantial evidence" upon which the majority rests its finding that the Respondent "knew or reasonably should have known" that O'Brien was interested in nonequivalent positions consists of the same contacts which the majority has already found were inquiries about the availability of substantially equivalent positions. Such inquiries about the "availability of work," or when one could return—or be "recalled"—to work "again" are not, in my view, applications, much less applications for nonequivalent positions.

My colleagues attempt to gloss over this lack of evidence by asserting that since O'Brien was not required, as a matter of law, to make inquiries about returning to a substantially equivalent position to preserve his right to do so, "O'Brien's words reasonably put the Respondent on notice to consider him for *any* available position." (Emphasis in original.) The facts do not admit of such an interpretation. O'Brien was lawfully entitled to return to a substantially equivalent position after the strike. His inquiries evidence his anxiousness to do so. Such inquiries are not uncommon. That is the end of the matter. By deriving their understanding of O'Brien's words from the legal context in which they arose, rather than from the plain language of the words themselves, my colleagues impose on O'Brien's words a legal significance not found in the words themselves and, by so doing, assume under the guise of legal "analysis" what they are, in fact, required to prove.

As to the plain meaning of the words themselves, my colleagues assert that O'Brien's use of the word "any" in his job inquiry of January 1997, when he asked if the Respondent "had any work available," as well as his other "open-ended" inquiries, "constituted oral applications for any available position." This is simply not the case. First, as explained above, O'Brien's inquiries about the "availability of work," or when one would be "recalled" to work "again" cannot reasonably be construed as *applications* for employment, i.e., as requests to be considered for positions not previously held, in this case nonequivalent positions. Second, given this context, it cannot be said that O'Brien's use of the word "any" in his inquiry of January 1997, about the availability of "any" work, standing alone, provided reasonable notice to the Respondent that O'Brien was making an oral application for nonequivalent positions.

To find otherwise, as my colleagues do, is to cure the lack of evidence, the failure of proof that O'Brien actually applied for nonequivalent positions, by shifting the burden of establishing that such application was in fact made from the General Counsel to the Respondent to show that it wasn't. By thus shifting the burden of proof, my colleagues reverse well-settled Board law that requires former strikers specifically to apply for nonequivalent positions. The effect of my colleagues' decision is to require instead that an employer offer a former striker any nonequivalent position available whenever the striker calls, as here, and inquires about the availability of work and when he can anticipate being recalled. I am not prepared to reverse Board law in this manner without an explanation of why such a change is necessary. My colleagues neither admit the change nor provide the explanation.

In sum, since it is agreed that O'Brien's job inquiries related to positions, which were substantially equivalent to his former position, I cannot find, as my colleagues do, that these same inquiries evidence O'Brien's application for nonequivalent positions. In the absence of record evidence to the contrary, I must find that O'Brien never applied for the nonequivalent positions at issue. It follows that in these circumstances, the Respondent cannot be found to have unlawfully refused to consider O'Brien's application. Accordingly, I would reverse the judge and dismiss this allegation of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[3] I am aware that during the relevant time period the Respondent had posted at its facility a sign that stated the Respondent was not accepting applications. I find the posting irrelevant to the present analysis in the absence of evidence that O'Brien intended to apply for nonequivalent positions.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to immediately reinstate unfair labor practice striker Tim O'Brien to the substantially equivalent material expediter and Vicon machine operator positions that became available in February and December 1998, respectively.

WE WILL NOT fail and refuse to consider Tim O'Brien for the nonequivalent and substantially equivalent positions that become available.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer unfair labor practice striker Tim O'Brien immediate and full reinstatement to the material expediter position that became available in February 1998, and to the Vicon operator position that became available in December 1998 or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL consider Tim O'Brien for current and future openings in nonequivalent positions and substantially equivalent positions, in accord with nondiscriminatory criteria.

ZIMMERMAN PLUMBING AND HEATING CO., INC.

Amy J. Roemer, Esq., for the General Counsel.
Elizabeth Welch Lykins, Esq., of Grand Rapids, Michigan, for the Respondent-Employer.
Tinamarie Pappas, Esq., of Ann Arbor, Michigan, for the Charging Party.

SUPPLEMENTAL DECISION

BRUCE D. ROSENSTEIN, Administrative Law Judge. On June 2, 1999, I issued a decision in the subject case. On July 18, 2001, after review of my decision, the National Labor Relations Board (the Board),[1] issued an order remanding the case to determine whether employee Timothy O'Brien unequivocally intended to sever his employment relationship with the Respondent, and if O'Brien and employee James Fogoros were excluded from consideration for jobs that became available in 1998 because of their union affiliation. The Board further ordered me to prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order, as appropriate.

I. BACKGROUND

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to offer former unfair labor practice strikers O'Brien and Fogoros reinstatement to newly created positions that were substantially equivalent to their prestrike positions. The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by failing to offer O'Brien and Fogoros certain of these new positions because of their union activity.

II. FACTS

The Respondent fabricates sheet metal products at its facility in Kalamazoo, Michigan, and installs these products at various construction sites in Michigan. Certain of the Respondent's employees engaged in an unfair labor practice strike against the Respondent from August 22 to September 6, 1995. Among the unfair labor practice strikers were O'Brien, an apprentice sheet metal worker, and Fogoros, a journeyman sheet metal worker.

O'Brien began working for the Respondent in 1991. As an apprentice sheet metal worker, O'Brien spent approximately 70 to 80 percent of his time fabricating sheet metal in the shop at the Respondent's Kalamazoo facility. In early 1995, the Respondent promoted O'Brien to a working foreman position in the shop. In this position, O'Brien continued fabricating sheet metal, but also operated the Vicon machine[2] and other tools, including brakes and drills. In addition, O'Brien drove a truck on four or five occasions in 1995 to deliver supplies to a particular jobsite.[3] Immediately prior to the strike, O'Brien earned $11 per hour and received health benefits partially funded by the Respondent. O'Brien also was eligible to participate in the Respondent's 401(k) retirement plan.

The Respondent hired Fogoros in 1986. As a journeyman sheet metal worker, Fogoros worked primarily in the field. He performed some sheet metal work himself and oversaw a crew of two to five workers as they installed sheet metal and heating, ventilation, and air conditioning (HVAC) equipment. Fogoros rarely drove any of the Respondent's trucks. He earned between $14 and 20 per hour and was eligible to participate in the Respondent's health and retirement plans.[4]

[1] See 334 NLRB 955 (2001).

[2] The Vicon machine is a computer-guided tool used for cutting fittings for sheet metal ductwork.

[3] On May 15, 1995, the Respondent transferred O'Brien from the sheet metal shop to the field. On September 27, 1995, while O'Brien was on layoff after the strike, the Respondent removed him from a sheet metal apprentice program and reclassified him as a "helper." The Board in *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), enfd. in pertinent part 188 F.3d 508 (6th Cir. 1999) (unpublished table decision), (*Zimmerman I)* found that all of these actions were unlawful.

[4] In *Zimmerman I,* the Respondent was ordered to rescind the no-solicitation/no-sticker rule on hardhats and to rescind an attendance related disciplinary warning letter to Fogoros.

On September 6, 1995, the day the unfair labor practice strike ended, the strikers including O'Brien and Fogoros made an unconditional offer to return to work. The Respondent informed O'Brien and Fogoros that it had no available work for them, but it would place them on a preferential hiring list and recall them when work was available in their respective job classifications.

In the meantime, O'Brien and Fogoros each worked for other employers. Between September 6, 1995, and February 1997, O'Brien worked for several sheet metal contractors. In February 1997, O'Brien obtained a job as an apprentice sheet metal worker with W. Soule, Inc. Fogoros also worked for several contractors following his layoff. In June 1997, he began working for Diversified Mechanical, Inc. as a journeyman sheet metal worker.

As of the October 29, 2001 hearing in this case, the Respondent has not recalled either O'Brien or Fogoros. The Respondent argues that since September 1995, it had no openings for apprentice or journeymen sheet metal workers. However, the Respondent acknowledges that it hired new employees during that time period. In particular, the Respondent hired several new employees in 1998, including Ed Weese, Bill MacPherson, Matthew Bielski, Austin Wielenga, Benjamin Emery, and Tammy Ickes.

The Respondent hired Ed Weese on January 20, 1998, as a material expediter, a new classification at a wage rate of $8 per hour. Weese mostly performed truckdriving duties until he resigned in early February 1998. On February 16, 1998, the Respondent hired Bill MacPherson as a material expediter at a wage rate of $12 per hour. MacPherson spends most of his time in the Respondent's sheet metal shop, where he performs sheet metal work, coordinates deliveries to various jobsites, keeps track of the Respondent's power tools, and sends the tools out for repair or repairs them himself on occasions. He also occasionally drives a truck with supplies to a jobsite.

In April 1998, the Respondent hired Matthew Bielski as a co-op student. He resigned in June 1998. The Respondent also hired Austin Wielenga, a student, to work during the summer of 1998 as a general laborer. Wielenga left the Respondent in August 1998 to return to school. Although the Respondent classified Wielenga as a sheet metal shop helper, he actually performed only general cleanup duties in his limited time with the Respondent. On November 30, 1998, the Respondent hired Benjamin Emery as a material expediter at a wage rate of $8.25 per hour. Emery spends most of his time driving a truck and also does general labor work.

Finally, the Respondent hired Tammy Ickes on December 2, 1998, as a Vicon machine operator with an hourly wage of $10.25. There is no evidence that Ickes had any prior experience operating a vicon machine or even performing sheet metal work. Indeed, Ickes' job application shows that her experience was in providing customer service and performing clerical duties.

III. APPROPRIATE CASE LAW

It is settled that both economic strikers and unfair labor practice strikers retain their status as "employees" under Section 2(3) of the Act. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). As a result, an employer violates Section 8(a)(1) and (3) of the Act by failing to immediately reinstate strikers upon their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

The Board has recognized that one legitimate and substantial justification for not immediately reinstating former strikers is a bona fide absence of available work for the strikers in their prestrike or substantially equivalent positions. See, e.g., *Randall, Burkart/Randall*, 257 NLRB 1, 6–7 (1981), enfd. in pertinent part 687 F.2d 1240 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983).

A former striker awaiting reinstatement may accept interim employment elsewhere. Indeed, the Board has recognized that the right to seek interim employment is a vital adjunct to the exercise of the right to strike and is itself protected activity. See *Christie Electric Corp.*, 284 NLRB 740, 759 (1987). Accepting interim employment normally will have no effect on a former striker's reinstatement rights. One exception is that if a former striker accepts other "regular and substantially equivalent employment," within the meaning of Section 2(3) of the Act, then he forgoes his reinstatement rights with the employer. See *Marchese Metal Industries*, 313 NLRB 1022, 1028–1031 (1994); *Little Rock Airmotive Inc.*, 182 NLRB 666, 667 (1970), enfd. in pertinent part 455 F.2d 163 (8th Cir. 1972).

Determining whether a former striker's interim employment constitutes "regular and substantially equivalent employment" cannot be answered by a "mechanistic application of the literal language of the statute." *Little Rock Airmotive*, 182 NLRB at 666–667. Thus, while the Board compares the terms and conditions of the striker's interim job to his prestrike job, the Board ultimately gives controlling weight to whether the "striker intended to abandon his employment with the employer by accepting interim employment with another employer." *Marchese Metal*, 313 NLRB at 1030. The Board presumes that the striker did not intend to forfeit his reinstatement rights; the burden is on the employer to prove otherwise. See *Marchese Metal*, 313 NLRB at 1031 fn. 1.

A. Tim O'Brien

The Board found that the material expediter position filled by Bill MacPherson on February 16, 1998, was substantially equivalent to O'Brien's prestrike position. Likewise, the Board found that Tammy Ickes' Vicon machine operator position in the sheet metal shop was substantially equivalent to O'Brien's prestrike position.

In February 1997, when O'Brien started working at W. Soule, he held the position of an apprentice sheet metal worker and was paid $19 per hour. While working full time, he completed the sheet metal apprenticeship program under the auspices of Local 7 of the Sheet Metal Workers Union and was promoted to a journeyman sheet metal worker at W. Soule in August 1998. As a journeyman sheet metal worker, his starting base pay was $23 per hour. In October 2001, O'Brien now

earns $24.82 per hour in base pay. As part of his benefit package at W. Soule, he receives fully paid health insurance and is covered by a pension plan.

O'Brien testified that after the Union made an unconditional offer to return to work and the Respondent placed him on a preferential hiring list on September 6, 1995 (GC Exh. 7), he wrote several letters and made a number of telephone calls to the Respondent inquiring about availability for employment. Both Teresa Hazzard (Respondent's secretary), and Richard Mahoney (Respondent's operations manager), acknowledges that they were aware that O'Brien continued to inquire about work availability after September 6, 1995. Indeed, the Board found in its decision that O'Brien also followed up with the Respondent concerning job availability in January 1997. At that time, O'Brien testified that while Link informed him that no work was currently available, he would contact him when things picked up.

On November 15, 1999, while O'Brien was still working at W. Soule, the Respondent sent him a letter confirming that he would be reinstated into their apprenticeship program (R. Exh. 4). The Respondent informed the Regional Manufacturing Tech Center at Kellogg Community College and O'Brien that his name was added to the list of authorized apprentices and he could begin attending the college immediately. Shortly after O'Brien received this letter, he talked to one of Respondent's owners and apprised him that he would like to work for them. The manager informed O'Brien that he was ordered to put him back into the apprenticeship program and that is what he was doing. (Part of remedy in *Zimmerman I.*) O'Brien informed the manager if that is what he had to do to go back to work, he would. O'Brien started the apprenticeship program in November 1999, and continued taking courses until February 2000, when he stopped attending because his practical experience as a journeyman sheet metal worker had adequately prepared him for the remaining curriculum. While attending the course, O'Brien conversed with an apprentice sheet metal worker employed at Respondent and informed him that he was enrolled in the program in order to get back to work with the Respondent. During one of these conversations in February 2000, the employee informed O'Brien that Ickes recently resigned her employment as the Vicon machine operator at the Respondent. O'Brien credibly testified that in February 2000, he went to Respondent's offices and spoke to one of Respondent's secretaries. He apprised her that he was interested in the position. The secretary went upstairs and checked with Respondent's president who indicated that there was no opening for the position.

The Respondent contends that O'Brien accepted "regular and substantially equivalent" employment as a journeyman sheet metal worker with W. Soule in February 1997, thereby relieving the Respondent of its duty to offer him reinstatement.

The Respondent argues that the pay and benefits earned by O'Brien while employed at W. Soule were far superior to that of an apprentice sheet metal worker employed at Respondent. For example, apprentice sheet metal workers earn between $11 and $15 per hour at Respondent. In February 1997, when O'Brien commenced employment as an apprentice sheet metal worker at W. Soule, he earned $19 per hour. As a journeyman sheet metal worker at W. Soule, both the pay ($24.82 per hour), and the substantial benefit package including fully paid health insurance and a covered pension plan is far superior to that enjoyed at the Respondent.[5] Indeed, Respondent asserts that if O'Brien were to return to its employ as an apprentice sheet metal worker, he would take an approximate 50-percent reduction in base pay. Under these circumstances, the Respondent opines that O'Brien intended to sever his employment relationship with the Respondent.

As a starting point, the Board presumes that the striker did not intend to forfeit his reinstatement rights and the burden is on the employer to prove otherwise.

For the following reasons, I find that by O'Brien's actions and statements, he did not intend to sever his employment relationship with the Respondent.

O'Brien testified that he would have accepted a pay reduction to go back to the Respondent if he were offered the material expediter, vicon machine operator, or truck driver positions. O'Brien explained his rationale on the basis of once employed he believed he could move up into a journeyman sheet metal position and earn close to what he was paid at W. Soule. He also noted that the Respondent offered paid vacation benefits based on the number of years employed while union contractors do not pay for vacations. Likewise, he asserted that he never intended to resign his employment with Respondent and points to the fact that he did not withdraw his 401(k) funds from the Respondent's retirement plan.

While I agree that these are convincing reasons, I primarily rely on the perseverance of O'Brien in continuing to inquire about employment opportunities at the Respondent since being placed on the preferential hiring list in September 1995. In this regard, O'Brien by letters, telephone calls and personal visits to Respondent continually renewed his interest in returning to their employ. While the Respondent argues that they did not believe that O'Brien would accept the positions it filled in 1998 because they were not sheet metal positions and paid half as much as what he was earning, it never gave O'Brien the opportunity to consider such an offer of employment. Despite Link's statement that he would give O'Brien a call if employment picked up, the Respondent never contacted him to inquire whether he was interested in returning to their employ for any of the available positions that were filled in 1998. Equally convincing that O'Brien did not unequivocally intend to sever his employment relationship with the Respondent was his acceptance of their offer of reinstatement into the apprenticeship program in November 1999. *Little Rock Airmotive, Inc.*, supra, (employee continued to make his availability for reinstatement known through letter, phone, and personal contact).

[5] Respondent job classifications show that journeyman sheet metal workers earned between $14 and $20.95 per hour in 1999 (GC Exh. 21), $14 and $23 per hour in 2000 (GC Exh. 22), and $14 to $25.69 per hour in 2001 (GC Exh. 23).

Additionally, in November 1999, O'Brien informed a manager of Respondent that he wanted to work for them and if he had to enroll in the apprenticeship program to do so, he would. He also informed a fellow apprentice sheet metal worker that he enrolled in the program in order to be reemployed at Respondent and in February 2000, informed a secretary of Respondent that he was interested in the vacant Vicon machine operator position recently vacated by Ickes.

Because all that the Respondent has shown is that O'Brien obtained a job at W. Soule at higher wages and benefits, and no other evidence of intent that he abandoned his job, it has not met its burden of proof in this regard. *K. Van Bourgandien*, 294 NLRB 268, 275 (1989).

Under these circumstances, I conclude that the Respondent has not presented evidence to relieve it of its duty to offer O'Brien reinstatement to the material expediter and the vicon machine operator positions. Therefore, I find that Respondent has engaged in violations of Section 8(a)(1) and (3) of the Act when it refused to reinstate O'Brien in substantially equivalent positions to his prestrike position.

B. James Fogoros

The Board found that the positions filled by Bielski, Wielenga, and Emery in 1998, were not substantially equivalent to Fogoros' prestrike job as a journeyman sheet metal worker. Therefore, it dismissed the complaint insofar as it alleges that the Respondent unlawfully failed to recall Fogoros to substantially equivalent positions that became available in 1998.

Unlike O'Brien, who persevered with repeated attempts to establish his interest in returning to the employ of Respondent, Fogoros did not undertake such actions. Accordingly, for the following reasons, I find that Fogoros abandoned any interest in working for the Respondent. Moreover, I find that the Respondent was aware that Fogoros was gainfully employed in a journeyman sheet metal position with a union contractor.[6]

By letter dated September 6, 1995, the Respondent placed Fogoros on a preferential hiring list and requested that he notify them if he was interested in returning to work (GC Exh. 8). During the first 90 days after being placed on this list, Fogoros while visiting the facility for the purpose of making his health insurance payment made an inquiry if work was available. After that one inquiry, Fogoros did not visit the facility again or make any inquiries either in writing or by telephone that he was interested in being reemployed with the Respondent. Fogoros acknowledged that the pay and benefits at Diversified Mechanical were higher then he received at the Respondent and he would undergo a substantial base pay cut if he returned to Respondent's employ in any position including that of a journeyman sheet metal worker. Likewise, Fogoros admitted that the fully paid health insurance benefits and the pension plan coverage at Diversified Mechanical were far superior to those received while employed at Respondent. Fogoros also testified that the sheet metal work at Diversified Mechanical and the Respondent was identical.[7]

Fogoros asserted that he was interested in returning to the employ of Respondent, and never intended to resign his position as evidenced by leaving his contributions in the Respondent's retirement plan.[8] In 1998, the positions of material expediter, vicon machine operator and truckdriver became available at Respondent. If Fogoros was truly interested in returning to work for the Respondent, it stands to reason that he would have made a number of inquiries between 1995 and 1998, and in subsequent years, for available employment opportunities. The record confirms, however, that he made no such attempts.

Under these circumstances, I find that Fogoros abandoned any interest in working for the Respondent when he obtained regular and substantially equivalent employment at Diversified Mechanical.

IV. THE *WRIGHT LINE* ANALYSIS

The Board held that even if the Respondent was not required to offer O'Brien or Fogoros any of the jobs that became available in 1998, the Respondent was not privileged to exclude them from consideration for these positions because of their union affiliation.

In *Wright Line*, 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1992), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or (1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 313 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

[6] Link credibly testified that the construction community was small and close knit and that various subcontractors reported to him that Fogoros was employed at Diversified Mechanical. Additionally, when Fogoros was laid off from a union contractor and applied for unemployment insurance, the Respondent would get a copy of the application. Thus, Respondent was aware that Fogoros was an employee of a union contractor.

[7] In *H & F Binch Co.*, 188 NLRB 720, 725 (1971), the Board found that three employees abandoned their employment. (Board found from the testimony that these employees were "satisfied" with their new positions.)

[8] I am not convinced that by Fogoros leaving his contributions in the Respondent's retirement plan, it establishes the requisite intent that he did not abandon his employment at the Respondent. In this regard, Link testified that at least seven or eight former employees have left their retirement contributions in the Respondent's 401(k) plan.

With respect to O'Brien, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in refusing to consider him for available positions in 1998. In this regard, the Board previously found that O'Brien picketed and participated in the unfair labor practice strike that commenced on August 22, 1995. Respondent was also ordered to rescind the attendance related disciplinary warning letter to O'Brien and to reinstate him in the apprenticeship program with no loss of credit and to remove any reference to his September 1995 removal from the program.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

As it concerns O'Brien, I previously found that he did not abandon any interest in working for the Respondent. I find that the reasons advanced by Respondent for not considering O'Brien for the material expediter, the Vicon machine operator and truckdriver positions are pretextual and suggest a predetermined plan to make sure that one of the leading union activists not be reemployed at the Respondent.

First, as found by the Board, O'Brien was qualified and should have been reemployed in MacPherson's material expediter position and Ickes' Vicon machine operator position as they were substantially equivalent to his prestrike position. The Respondent argues that it did not offer the positions to O'Brien because it had a good-faith belief that he was gainfully employed as a journeyman sheet metal worker and made substantially more in wages and benefits compared to the vacant positions. However, it never once inquired of O'Brien whether he was interested in those jobs. This position does not withstand scrutiny in the face of repeated inquiries from O'Brien as to the availability of work at the Respondent and Link's statement to O'Brien in January 1997, that if things picked up he would give him a call. The shifting, inconsistent and contradictory reasons given for the refusal to offer the above-noted positions to O'Brien leads me to conclude that they were advanced to preclude O'Brien from returning to the employ of Respondent to prevent him from engaging in organizing activities.

Under these circumstances, and particularly noting that O'Brien did not abandon any interest in working for the Respondent, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it excluded O'Brien from consideration for the material expediter, Vicon machine operator, and truckdriver positions.

With respect to Fogoros, I previously found that he abandoned any interest in working for the Respondent and the Respondent was aware of the abandonment through his performance of identical sheet metal work at Diversified Mechanical.

Under these circumstances, and particularly noting that Fogoros did abandon his interest in working for the Respondent, I find that the Respondent did not exclude Fogoros from consideration for any vacant position because of his protected activities.[9] Therefore, I recommend that the General Counsel's 8(a)(1) and (3) allegations regarding Fogoros be dismissed.[10]

[9] Both Link and Mahoney credibly testified that Fogoros was not considered for the truckdriver position or other vacant positions because he was a skilled journeyman and they did not believe he was interested in accepting less skilled positions. They both were aware that Fogoros was working at Diversified Mechanical and did not believe he was interested in the positions that became available in 1998, and paid substantially less than the approximately $23–24 per hour that he was then earning.

[10] If others disagree, I would still find that the Respondent would not have considered Fogoros for the vacant positions in 1998 even in the absence of his union activities. In this regard, Fogoros did not make any inquiries concerning the availability of work at the Respondent after his initial inquiry in September 1995, and he testified that the sheet metal work at Diversified Mechanical was identical to that of Respondent for which he was paid substantially more. Moreover, I credit the testimony of Link and Mahoney that they did not consider Fogoros for truckdriving duties or other vacant positions due to the fact that he was a skilled journeyman sheet metal worker who was paid substantially more than the wages paid for those positions. I also note that Fogoros, while qualified, did not drive a truck very often during his 10 years of employment at the Respondent.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union and Local 7 are labor organizations within the meaning of Section 2(5) of the Act.
3. By failing and refusing to immediately reinstate unfair labor practice striker Tim O'Brien to his former or substantially equivalent positions upon his unconditional offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.
4. By excluding unfair labor practice striker Tim O'Brien from the material expediter, Vicon machine operator, and truckdriver positions upon his unconditional offer to return to work, Respondent violated Section 8(a)(1) and (3) of the Act.
5. The Respondent did not violate the Act with respect to any allegations concerning unfair labor practice striker James Fogoros.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Since the Respondent unlawfully failed and refused to reinstate unfair labor practice striker Tim O'Brien upon his unconditional offer to return to work, I shall recommend that the Respondent be required to reinstate him immediately to his former position or, if that position no longer exists to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing if necessary any persons hired after January 20, 1998, and make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate him from the date of his offer to return to work. Backpay is to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, having found that the Respondent violated the Act by excluding O'Brien from consideration for the material expediter, Vicon machine operator, and truckdriver positions, I recommend that the Respondent be directed to offer reinstatement to O'Brien to one of these positions and make him whole for any loss of pay and benefits he

may have suffered by virtue of the Respondent's discrimination against him, such payments to be computed as outlined above.

[Recommended Order omitted from publication.]